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# LOCALISM, LABELS, AND ANIMAL WELFARE

Samuel R. Wiseman\*

## ABSTRACT

*The law does relatively little to improve the welfare of animals raised for food. In the short term, at least, market-based solutions appear to have more promise as a means of promoting farm animal welfare, as consumers increasingly seek out local and humanely-raised meat and eggs. To aid consumers in identifying these products, certification systems of varying degrees of rigor exist, but even these are of little use to consumers in the restaurant context, which accounts for a large percentage of meat consumption. Patrons see only finished meals, making fraud difficult to detect, and a recent newspaper investigation suggests that fraud may indeed be widespread. Solving this problem likely involves a combination of heightened regulatory efforts and activism from local agriculture and animal welfare groups.*

## I. INTRODUCTION

As consumer attention to the source and quality of food has grown in recent years, so, too, has concern about the practices used to raise food. With criticism of mass agriculture and processed foods entering the mainstream, consumers are more aware of the variety of conditions endured by livestock, such as crowded cattle feedlots and cramped boxes for egg-laying hens. And there is evidence that consumers are sufficiently concerned about these conditions to change their buying habits accordingly.<sup>1</sup> But there are few regulations that meaningfully address the welfare of the animals that supply much of the food on consumers' plates. Most animal welfare regulations apply to pets or activities that have historically captured public concern, such as rooster and dog fighting.<sup>2</sup> And the few

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<sup>1</sup> See, e.g., Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 Animal L. 391, 405–06 (2013) (noting that “[t]he general consensus appears to be that consumer spending habits are, if anything, responsible for decreasing the overall provision of agricultural animal welfare, not increasing it,” but that contingent valuation surveys involving hypothetical willingness to pay U.S. consumers “indicate a willingness to pay substantial premiums for animal products associated with enhanced-welfare practices”).

<sup>2</sup> See, e.g., Justin Marceau, *How the Animal Welfare Act Harms Animals*, HASTINGS L.J. (forthcoming 2018) (describing how the structure of the AWA allows negligent and abusive animal owners to “hide”

regulations that do address livestock typically only indirectly impact welfare by, for example, limiting pollution from large livestock operations. Some local governments and states have begun to directly regulate farm animal welfare—banning foie gras from force-fed geese and eggs from crate-bound hens, for example—but they represent the exception to the norm.<sup>3</sup>

Given the scant public law in this area, the best available means of influencing farm animal welfare appear to be market-based solutions explored in other contexts. The environmental law literature, in particular, documents a variety of non-regulatory mechanisms that can effect change,<sup>4</sup> although the success of these approaches varies. In the food context, the most promising mechanisms to harness consumer choice and market forces in favor of animal welfare include verified labeling (particularly where producers can see declines in wholesale and retail sales and trace the consumer preferences associated with the decline); audit, inspection, and certification of farms and ranches; and, particularly for restaurants, procurement and supply chain certification. Indeed, some of these approaches are already employed in the food context. For example, there are a limited number of voluntary guidelines and certification programs to which both small and large farms subscribe.<sup>5</sup> And it is increasingly common to see labels boasting that eggs are free range or that beef comes from pasture-raised cows,<sup>6</sup> although these claims sometimes lack certification. Like greenwashing in the environmental context, many of these claims merely increase profit margins without providing meaningful or verifiable changes in producer practices.

With somewhat limited formal market mechanisms available—and questionable verification behind some of the common animal welfare claims—many consumers who are concerned about animal welfare appear to rely on more rudimentary proxies for welfare by purchasing “local” food. Some shoppers at farmers markets and patrons of farm-to-table restaurants are there, in part, because they assume that livestock raised on smaller, local farms is less likely to have spent its life in a crate with very limited access to light and air, and was perhaps butchered more humanely.<sup>7</sup> And even consumers who primarily focus on food quality, taste, and environmental impacts—other common reasons for purchasing local foods—likely at least appreciate the added, assumed benefit that the food was more humanely raised. Indeed, this assumption is perhaps correct in most circumstances. A pig or hen raised on a smaller, “sustainable” farm with fewer heads of livestock is less likely to be crammed into a crate or stall with other animals.<sup>8</sup> If so, animals benefit when local meat supplants mass-produced meat, regardless of consumers’ motivations.

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behind the veneer of an AWA license, how the Act focuses on a very narrow set of animals, and how it is “being employed to benefit those who exploit animals”). *See also infra* notes 14–18 and accompanying text.

<sup>3</sup> *See infra* notes 16, 19–28, and their accompanying text.

<sup>4</sup> *See, e.g.,* Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013); Amanda C. Leiter, *Fracking, Federalism, and Private Governance*, 39 HARV. ENVTL. L. REV. 107 (2015).

<sup>5</sup> *See infra* notes 62–81 and accompanying text.

<sup>6</sup> *See infra* note 62 and accompanying text.

<sup>7</sup> *See infra* note 96 and accompanying text.

<sup>8</sup> *See, e.g.,* *Why Buy Sustainable?*, GRACE COMM. FOUND., <http://www.sustainabletable.org/943/why-buy-sustainable> (last visited Nov. 2, 2017) (“Sustainably raised animals are treated humanely and are permitted

But local food claims appear, unfortunately, to be often unreliable. Food sold at farmers markets and farm-to-table restaurants may not be, in fact, local. As explored in prior work, farmers market fraud, although difficult to detect and quantify, appears not uncommon.<sup>9</sup> And recent investigations of restaurants, which will be a focus of this Essay, have revealed that supposedly local meat came from the freezer truck of a large foodservice distributor.<sup>10</sup> Given that more than 40% of food spending was on food outside the home as of 2012, the scope of the problem is potentially large.<sup>11</sup>

Considering the potential of demand for local and humanely raised meat to enhance animal welfare, this Essay explores potential approaches to better verifying the origin of food products. For direct purchases, improved labeling and verification of the specific claim on the label would allow consumers to signal their preference for animal welfare by purchasing local foods raised in more humane conditions. And for food purchased in restaurants, a procurement/supply chain verification program—although likely expensive—is a potential solution. Alternatively, the health inspections that local governments and state officials already conduct, and which sometimes include source verification, could be conducted more frequently, and the severity of punishment could be increased. Perhaps more realistically, local food groups and nonprofit agricultural organizations could supply the resources needed for verifying the local origin of animal products at restaurants, conducting the types of investigations recently completed by the *Tampa Bay Times*.<sup>12</sup>

Part I of this Essay documents the dearth of direct animal welfare regulations, and Part II introduces the range of potential market-based approaches that could apply in the food context. Part III discusses localism as a proxy for animal welfare and the problem of local food fraud, then briefly explores potential strategies for best alerting customers to the local attributes of food to enable customers to purchase food that they believe is more likely to have been raised humanely, along with other benefits of local animal products. This part addresses the problem as well as potential fixes with a focus on the restaurant context. For those most concerned about animal welfare, public law might ultimately be a more effective route if adequate enforcement resources were available, or more direct consumer signals than choosing local foods might be preferable. But given the current options and the apparently common reliance on food source as a proxy for welfare, food origin claims, particularly those made by restaurants, appear to need far better verification if they are to serve as a second- or third-best signal for consumers' animal welfare preferences.

## II. THE LIMITED PUBLIC LAW OF FARM ANIMAL WELFARE

Animal welfare has a long history in the United States, but the public laws in this area—while old—are not extensive. The American Society for the Prevention of Cruelty

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to carry out natural behaviors such as rooting in the dirt and pecking the ground . . . . Factory-farmed animals are crammed together in unsanitary conditions where they suffer horribly and are often sick.”).

<sup>9</sup> See Samuel R. Wiseman, *Fraud in the Market*, REGENT U. L. REV. 367, 369 (2014).

<sup>10</sup> See *infra* note 106-08 and accompanying text.

<sup>11</sup> *Food-Away-From-Home*, U.S. DEP'T AGRIC.: ECON. RES. SERV., <https://www.ers.usda.gov/topics/food-choices-health/food-consumption-demand/food-away-from-home.aspx> (last visited Nov. 2, 2017).

<sup>12</sup> See *infra* note 106-08 and accompanying text.

to Animals was founded in 1866, initially focusing on the treatment of workhorses and carthorses, as well as cockfighting and dogfighting.<sup>13</sup> This group and other humane societies that soon organized fought for and sometimes successfully obtained limited state and local (and, in rare instances, federal<sup>14</sup>) legislation addressing animal welfare issues.<sup>15</sup> The most common legislation now prohibits cruelty to animals—particularly pets—and continues to ban rooster and dog fighting,<sup>16</sup> although enforcement of these laws varies widely.<sup>17</sup>

Much of this legislation primarily benefits the animals that are most visible in people's lives—pets and farm animals used for entertainment rather than food production practices.<sup>18</sup> But the rise of the foodie movement and more attention paid to the quality of food and its production has generated growing concern about the welfare of animals raised for meat and other products. And some local governments and states have responded with legislation and voter initiatives. In California, voters opted to ban small animal enclosures for chickens, calves, and pregnant pigs within the state,<sup>19</sup> and the legislature subsequently prohibited the sale in California of any eggs from chickens raised in small cages.<sup>20</sup> The California legislature also banned the sale of foie gras<sup>21</sup>—which is meat from force-fed

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<sup>13</sup> *History of the ASPCA*, AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, <https://www.asPCA.org/about-us/history-of-the-asPCA> (last visited Nov. 2, 2017).

<sup>14</sup> Animal Welfare Act, Pub. L. No. 89-544, § 1, 80 Stat. 350 (codified at 7 U.S.C. §§ 2131–2159) (addressing the humane treatment of “animals intended for use in research facilities or for exhibition purposes or for use as pets”); 49 U.S.C. § 80502 (prohibiting, with some exceptions, the confined transport of “animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest”); Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765, 72 Stat. 862 (codified at 7 U.S.C. §§ 1901–1907) (hereinafter “Humane Methods of Slaughter Act of 1958”) (requiring that “cattle, calves, horses, mules, sheep, swine, and other livestock” be “rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut,” or that they be slaughtered “in accordance with” certain “ritual requirements of the Jewish faith or any other religious faith”); *see also* Valerie J. Watnick, *The Business and Ethics of Laying Hens: California's Groundbreaking Law goes into Effect on Animal Confinement*, 43 B.C. ENVTL. AFF. L. REV. 45, 55–56 (2016) (describing these laws and proposed but failed federal laws addressing the welfare of farm animals).

<sup>15</sup> *History of the ASPCA*, *supra* note 13.

<sup>16</sup> MICH. COMP. LAWS ANN. § 750.49 (West 2006) (prohibiting the ownership and use of animals for “fighting, baiting, or shooting” or as a target for marksmanship).

<sup>17</sup> *See* Marceau, *supra* note 2.

<sup>18</sup> Some general animal welfare laws could be extended to livestock, but in some cases courts may be hesitant to extend the language to livestock, in part due to legislative restrictions that would seem to prohibit this. For example, Michigan provides that a person shall not “[k]nowingly kill, torture, mutilate, maim, or disfigure an animal” but also makes clear that the law “does not prohibit the lawful killing of livestock or a customary animal husbandry or farming practice involving livestock.” MICH. COMP. LAWS ANN. § 750.50b (West 2009). While one could argue that confining hens in tiny boxes that prohibit the hens from extending their feet or moving around constitutes torture, it is a customary farming practice in many states and likely is not covered by the law. *See also* Marceau, *supra* note 2 (describing the limited groups of animals to which the AWA applies).

<sup>19</sup> Standards for Confining Farm Animals, CAL. HEALTH & SAFETY CODE §§ 25990–25994 (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/title-sum/pdf/prop2-title-summary.pdf>.

<sup>20</sup> CAL. HEALTH & SAFETY CODE § 25996 (2015); *see also* Watnick, *supra* note 14, at 46 (describing the initiative and legislation).

<sup>21</sup> CAL. HEALTH & SAFETY CODE § 25982 (2012).

birds—as did the City of Chicago for a short time.<sup>22</sup> In other examples of the small but growing public law effort to address farm animal welfare, Michigan has a statute similar to California’s initiative, prohibiting confinement that prevents a pregnant pig, veal calf, or egg-laying hens from “lying down, standing up, or fully extending its limbs” or “turning around freely,”<sup>23</sup> and Arizona,<sup>24</sup> Colorado<sup>25</sup> and Maine have similar legislative language for pregnant pigs and veal calves.<sup>26</sup> Florida<sup>27</sup> and Oregon<sup>28</sup> limit their prohibitions on inhumane confinement to pregnant pigs.

Aside from these types of state laws, similar provisions at the local levels (where local governments are not preempted from regulating farm animal welfare, as they are in some states<sup>29</sup>), and federal laws addressing the humane transport and slaughter<sup>30</sup> of farm animals, there are few public laws to establish a baseline of humane treatment for farm animals. Pollution laws, such as those that limit water pollutants from large confined animal feeding operations, might indirectly address welfare by forcing a reduction of the number of animals producing manure within a particular space. But for those concerned about the issue, the most promising solutions appear to be market-based mechanisms, as discussed in the following Part.

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<sup>22</sup> Ill. Rest. Ass’n v. City of Chi., 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007) (describing the 2006 Chicago ordinance); Ill. Rest. Ass’n v. City of Chi., No. 06 C 7014, 2008 WL 8915042 (N.D. Ill. Aug. 7, 2008) (describing the repeal of the ordinance).

<sup>23</sup> MICH. COMP. LAWS ANN. § 287.746 (West 2010).

<sup>24</sup> ARIZ. REV. STAT. ANN. §§ 13-2910.07–13.2910.08.

<sup>25</sup> COLO. REV. STAT. ANN. §§ 35-50.5-101–103 (West 2008).

<sup>26</sup> ME. REV. STAT. ANN. tit. 7, § 4020 (2009); *id.* tit. 17 § 1039 (2014). Note that this is not a comprehensive survey. For a helpful summary of states’ animal welfare laws—in cases where these laws have been located by researchers—see Elizabeth R. Rumley, *States’ Farm Animal Confinement Statutes*, NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/state-compilations/farm-animal-welfare/> (last visited Nov. 8, 2017).

<sup>27</sup> FLA. CONST. art. X, § 21.

<sup>28</sup> OR. REV. STAT. ANN. § 600.150 (West 2008).

<sup>29</sup> See, e.g., S.C. CODE ANN. § 47-4-160 (2009) (“Units of local government in this State may not enact ordinances, orders, or other regulations concerning the care and handling of livestock and poultry.”); GA. CODE ANN. § 2-1-6 (West 2009) (“No county, municipality, consolidated government, or other political subdivision of this state shall adopt or enforce any ordinance, rule, regulation, or resolution regulating . . . animal husbandry practices involved in the production of agricultural or farm products on any private property.”); OKLA. STAT. ANN. tit. 2, § 2-4c (West 2009) (“No municipality, county, or other political subdivision of this state shall enact or enforce any order, ordinance, or regulation concerning the care and handling of livestock within its jurisdiction that is more restrictive than rules promulgated by the Oklahoma Department of Agriculture, Food, and Forestry concerning the care and handling of livestock . . .”).

<sup>30</sup> Humane Methods of Slaughter Act of 1958.

### III. MARKET-BASED OPTIONS

Market-based approaches are touted by some scholars and potential regulatory targets as beneficial alternatives or additions to public law.<sup>31</sup> If designed correctly, they can more directly and efficiently address public concerns by harnessing consumer demand to affect producer behavior through market competition. Additionally, the entity that would otherwise be the target of regulation (or takes market approaches in addition to regulation) can choose the best, least costly means of addressing consumer preferences as opposed to facing governmental restrictions that define and limit acceptable compliance approaches.

Critics of these approaches point to a variety of downfalls, such as the many situations in which market signals are imperfect, or where providing consumers with information does not allow consumers to choose alternatives that will accurately address their concerns. In the environmental context, critics have also documented the common problem of greenwashing, where companies make labeling claims or obtain relatively loose certifications to sell their product at a higher price point without actually achieving the social benefits claimed.<sup>32</sup>

Market-based mechanisms for changing producer behavior are certainly imperfect, but particularly in contexts like animal welfare they might be the best available solution at this point. Animal welfare laws exhibit classic public choice problems, in which diffuse, relatively disorganized stakeholders who would collectively benefit from the laws often lose out to concentrated farming interests that individually have a great deal to lose if they are subject to regulation.<sup>33</sup> Most recently, this was perhaps best demonstrated by efforts to make poultry raising more humane. The Humane Society of the United States and United Egg Producers—a powerful cooperative of poultry farmers<sup>34</sup>—managed to reach a compromise regarding the welfare of laying hens and advanced proposed federal legislation based on this compromise.<sup>35</sup> But other powerful agricultural lobbying groups opposed the legislation and effectively killed it.<sup>36</sup>

Of course, if powerful agricultural interests are this ardently opposed to animal welfare regulation, there might be little motivation for them to voluntarily adopt protections. But if market signals are strong and direct enough, they could at least incrementally change producer

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<sup>31</sup> See, e.g., Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007) (describing and favorably analyzing supply chain contracting for environmental protection in markets with lax environmental regulation); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115 (2004) (noting the potential for improved information on pollution to enhance “market-based strategies” in addition to regulatory regimes).

<sup>32</sup> See, e.g., Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281 (2014) (defining the term, describing its history, and exploring greenwashing problems).

<sup>33</sup> See Jerry L. Anderson, *Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement*, 4 STAN. J. ANIMAL L. & POL’Y 1, 12 (2011) (“The insights of public choice theory can help explain the difficulty of enacting legislative reform, such as . . . animal welfare regulation, despite broad public support, when industrialists with concentrated economic self-interests dominate the political landscape.”).

<sup>34</sup> *About Us*, UNITED EGG PRODUCERS, <http://www.unitedegg.org/> (last visited Nov. 2, 2017) (showing that the group represents “the ownership of approximately 95% of all the nation's egg-laying hens”).

<sup>35</sup> Watnick, *supra* note 14, at 57.

<sup>36</sup> *Id.* at 57–58.

behavior, and/or lead to a larger supply of truly humanely raised and slaughtered meat. Market-based approaches used in other contexts that could find some purchase in the animal welfare context include labeling, producers' following voluntary guidelines and standards, producers' following standards and obtaining certification through an auditing regime, and retailers' use of procurement/supply chain certification.

#### A. *Market-Based Approaches in the Environmental Context*

The environmental law literature, in particular, has thoroughly charted the terrain of these and other market-based mechanisms.<sup>37</sup> Some of these tools involve governmental intervention in the sense that the government requires certain producer actions that could support market-based change, such as requiring the labeling of toxic products, which consumers might avoid.<sup>38</sup> Others are voluntarily followed by producers due to perceived or proven customer demand and associated market share advantages, or, more simply, a desire for producers to be good corporate citizens.

One of the most common examples of the use of labeling is a government-based initiative to inform consumers of the toxicity of products and associated health risks, including cancer, called California Proposition 65.<sup>39</sup> This voter-based initiative, enacted in 1986, requires producers, workplace managers, and others to provide "clear and reasonable warning" before exposing consumers to chemicals "known to the state to cause cancer or reproductive toxicity."<sup>40</sup> The resulting regulation constitutes a broad labeling requirement, covering "everything from shoe polish, newly constructed homes, and food and wine, to chemicals in the workplace and factory emissions."<sup>41</sup> Despite criticism regarding potential overwarning and inadequate communication of risk to the public, among other weaknesses,<sup>42</sup> the requirement motivated some manufacturers to change the ingredients in their products, such as submersible water pumps, ceramicware, and foil caps on wine that previously contained lead.<sup>43</sup>

Many producers label products with certain attributes even when they are not required to do so—opting, of course, to convey positive attributes that will inspire more consumers to buy their goods. In some cases the labels used are baseless, as demonstrated by a growing number of lawsuits.<sup>44</sup> But some labels are backed by legitimate practices that

<sup>37</sup> See *supra* note 4.

<sup>38</sup> See *infra* notes 39–42 and accompanying text.

<sup>39</sup> Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5–25249.25 (West 1987).

<sup>40</sup> *Id.* § 25249.6.

<sup>41</sup> Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 *ECOLOGY L.Q.* 303, 306 (1996).

<sup>42</sup> *Id.* at 327–33, 355–58 (summarizing the literature critiquing the proposition).

<sup>43</sup> *Id.* at 341–42, 346–47.

<sup>44</sup> *Parker v. J.R. Smucker Co.*, No. C 13–0690 SC, 2013 WL 4516156, at \*1, \*6 (N.D. Cal. Aug. 23, 2013) (addressing a claim that the claimed "all natural" oils supplied by the producer were not natural because they contained oils from genetically modified crops and noting that "the Court cannot as a matter of law conclude, as Defendant urges, that reasonable consumers would all understand that packaged, non-organic foods may contain bioengineered ingredients"); *Viggiano v. Hansen Nat. Corp.*, 944 F.Supp.2d 877, 881, 899 (C.D. Cal. 2013) (in a case involving alleged artificial ingredients in diet sodas labeled as containing "all natural flavors" but containing "two synthetic ingredients," dismissing the case without prejudice).



producers have chosen to follow. Some producers voluntarily comply with standards associated with a private or governmental audit and certification program, have their compliance verified, and then indicate compliance on their product. A common voluntary government-sponsored certification program is the Environmental Protection Agency's (EPA) Energy Star label. To bear this label, which represents a product with a minimum level of proven energy efficiency, products must be "tested in an EPA-recognized laboratory and reviewed by an EPA-recognized certification body" that confirms product compliance with voluntary efficiency standards written by EPA officials.<sup>45</sup>

For products that involve multiple components, or one ingredient sourced from a variety of suppliers, many certification programs also include a supply chain verification component. The program must "trace the origins of products, and product components, accurately through the many steps required to get a product to market."<sup>46</sup> A long-running environmental program with a supply chain certification component is the Sustainable Forestry Initiative (SFI), under which paper producers wishing to use the SFI label comply with third-party "requirements pertaining to indigenous and traditional use rights, worker safety, local employment, and community involvement," in addition to environmental practices and undergo third-party audits.<sup>47</sup> SFI has additional, specific standards for "fiber sourcing certification," where certificate participants must "show that the raw material in their supply chain comes from legal and responsible sources," and similar "chain-of-custody" standards that "track[] forest fiber content . . . through production and manufacturing to the end product."<sup>48</sup> Paper companies that participate in the fiber sourcing certification program must employ an auditor, must describe the "forestland, fiber procurement, and/or manufacturing operations included in the audit," and "maintain records" of all source material, among other tools designed to allow the certifier to trace the source of the fiber in the paper.<sup>49</sup> The Forest Stewardship Council has similar certification programs that are generally viewed as being more stringent.<sup>50</sup>

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because it was possible for the plaintiff to "replead his claims to avoid preemption and state a plausible claim for relief by identifying artificial *flavors*, rather than artificial ingredients, that Hansen's soda contains, or by identifying inconsistencies between the 'all natural flavors' label and the ingredients list"); Diana R. H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TUL. L. REV. 815, 847 n.179 (2015) (listing many other lawsuits relating to producers' claims regarding "natural" food).

<sup>45</sup> *Third-Party Certification*, ENVTL. PROTECTION AGENCY, [https://www.energystar.gov/index.cfm?c=third\\_party\\_certification.tpc\\_index](https://www.energystar.gov/index.cfm?c=third_party_certification.tpc_index) (last visited Nov. 4, 2017).

<sup>46</sup> Andrea Migone & Michael Howlett, *From Paper Trails to DNA Barcodes: Enhancing Traceability in Forest and Fishery Certification*, 52 NAT. RESOURCES J. 421, 424 (2012).

<sup>47</sup> Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2539 (2013).

<sup>48</sup> *SFI Standard 2015–2019*, SUSTAINABLE FORESTRY INITIATIVE, <http://www.sfiprogram.org/sfi-standards/> (last visited Nov. 4, 2017).

<sup>49</sup> SUSTAINABLE FORESTRY INITIATIVE, SFI 2015–2019 FIBER SOURCING STANDARD 8, 14 (2015), <http://www.sfiprogram.org/files/pdf/2015-2019-standardsandrules-section-3-pdf/>.

<sup>50</sup> Schultz, *supra* note 47 ("gold standard"); Migone & Howlett, *supra* note 46 (describing FSC certification and supply chain verification and challenges associated with it).

### B. Market-Based Strategies in the Food Context

In the food context, the USDA has issued regulations that establish a traceability program for animal disease.<sup>51</sup> These regulations are designed to allow the agency to identify an animal at slaughter and trace it back to its birth location and other locations in order to identify the potential origin of a disease.<sup>52</sup> The agency can also trace animals in the opposite direction, looking from a flock or herd on a farm and tracing animals forward to the point of slaughter, in addition to enabling certain tracking of “animals’ interstate movements.”<sup>53</sup>

Another food-based area that has received substantial supply chain attention is the sale of fish and processed fish. The Marine Stewardship Council has a certification program through which it verifies the source of fish by certifying, among other things, fishing areas, certain types of fish species, and the types of technologies used to catch fish.<sup>54</sup> But the program has encountered challenges, as evidenced by its failure to detect and correct the mislabeling of fish as Chilean sea bass.<sup>55</sup> Some scientists have pioneered programs that enable more direct tracing of fish source (and certain other types of food, such as coffee and genetically-modified food) through DNA barcoding.<sup>56</sup> Through this process, scientists use specific molecular markers and genetic analysis of these markers to identify the specific food within a product.<sup>57</sup> The FDA has approved DNA barcoding to prove the source of fish for compliance purposes,<sup>58</sup> and there have been public efforts to require more attention to safety and fraud issues in seafood, although not all have been successful. The proposed federal Safety and Fraud Enforcement for Seafood Act, which died in committee in Congress, would have required fish processors to include data “on the packaging display or otherwise[] including the market and species name, catch date” and other information.<sup>59</sup> Other federal traceability programs for fish are moving forward, including NOAA’s Seafood Import Monitoring Program,<sup>60</sup> which “establishes the reporting and recordkeeping requirements needed to prevent illegally harvested and misrepresented seafood from entering into U.S. Commerce.”<sup>61</sup>

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<sup>51</sup> Traceability for Livestock Moving Interstate, 78 Fed. Reg. 2040 (2013).

<sup>52</sup> See generally U.S. DEP’T OF AGRIC., ANIMAL DISEASE TRACEABILITY OVERVIEW (2014), [https://www.aphis.usda.gov/animal\\_health/downloads/sacah/ADT%20Overview%20for%20SACAH%2005%2022%2014.pdf](https://www.aphis.usda.gov/animal_health/downloads/sacah/ADT%20Overview%20for%20SACAH%2005%2022%2014.pdf).

<sup>53</sup> *Id.* at 1.

<sup>54</sup> Migone & Howlett, *supra* note 46, at 430–31 (citing MSC, INTERPRETING THE MSC PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING (2007)).

<sup>55</sup> *Id.* at 425.

<sup>56</sup> *Id.* at 433, 435–36.

<sup>57</sup> *Id.* at 433.

<sup>58</sup> *Id.* at 434 n.63.

<sup>59</sup> Safety and Fraud Enforcement for Seafood Act, S. 520, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/520>.

<sup>60</sup> See NAT’L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP’T OF COMMERCE, FINAL RULE TO IMPLEMENT U.S. SEAFOOD IMPORT MONITORING PROGRAM (n.d.), <http://www.iuufishing.noaa.gov/Portals/33/Traceability%20Final%20Rule%20-%20FRIR%20%20FRFA.pdf>.

<sup>61</sup> 82 Fed. Reg. 31758 (July 10, 2017).

### C. Market-Based Animal Welfare Programs

Just as private environmental governance has become a mainstream practice and topic, food has long been a target of various efforts to channel consumer preferences to improve food safety and, more recently, food quality and social stewardship. Mandatory labeling has primarily focused on nutrition, quality, and safety. But producers increasingly voluntarily prescribe to a variety of information disclosure practices—some more formal than others.

There are few government-led voluntary labeling programs for animal welfare. This is likely partially due to the USDA and FDA's focus on ingredients and food quality rather than the processes leading up to slaughter, packaging and labeling. As Professor Sean Sullivan notes, the USDA's only animal welfare-based labeling program is for poultry meat, and it only includes one label—"free range or free roaming"—for which "[p]roducers must demonstrate to the Agency that the poultry has been allowed access to the outside."<sup>62</sup> The USDA's organic standards partially address animal welfare, but only to a limited extent.<sup>63</sup>

With the dearth of government-backed labeling options for animal welfare and a lack of enforcement by the agencies tasked with verifying the credibility of all food product claims,<sup>64</sup> many producers label products as having certain animal welfare-based attributes without providing certification or other third-party assurance that the claims are true.<sup>65</sup> The proliferation of labels such as "free range," "free roaming," "cage free," "pasture-raised," "grass fed," and other terms, all of which lack a single, consensus-based definition and many of which lack verification, causes both consumer confusion and credibility concerns.<sup>66</sup>

There are a limited number of audit and certification programs for small and large U.S. farms, as well as guidelines that producers can voluntarily follow or incorporate as part of an audit or certification program, and these provide credibility in labeling. The programs vary in

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<sup>62</sup> Sullivan, *supra* note 1, at 412; *Meat and Poultry Labeling Terms*, U.S. DEP'T OF AGRIC., [https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/!ut/p/a1/jZHfT4MwEMf\\_Fh94LC0y1803QmIEHWQhatcXU7ZrISktaTsJ\\_vUyjsYzm-7u6e4-39wvzDDFTPO3VnLfGs3VIWbzV7Im82iZkrxcRnckK57X5UOakV1MwGbp4AivlB\\_xhLynz6\\_oMG1XaUriVnPfYNaLQymEjzi2g1gHabCmB1yXIAfkeBbj1wD4L8LitegWi0x7YAfVDvUm73ydvwpIQ-2c\\_gFs-NpSDR5VsTV7D4vYILOfgMnzvUFnL\\_HtLBUvpv78zSbRdbyYNrMgwIIN93ZKN9737jYgARmGIZTGSAXhInQBOSVpjPOYHpO4757o-2MiqgyxehyuPgCERj8l/#4](https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/!ut/p/a1/jZHfT4MwEMf_Fh94LC0y1803QmIEHWQhatcXU7ZrISktaTsJ_vUyjsYzm-7u6e4-39wvzDDFTPO3VnLfGs3VIWbzV7Im82iZkrxcRnckK57X5UOakV1MwGbp4AivlB_xhLynz6_oMG1XaUriVnPfYNaLQymEjzi2g1gHabCmB1yXIAfkeBbj1wD4L8LitegWi0x7YAfVDvUm73ydvwpIQ-2c_gFs-NpSDR5VsTV7D4vYILOfgMnzvUFnL_HtLBUvpv78zSbRdbyYNrMgwIIN93ZKN9737jYgARmGIZTGSAXhInQBOSVpjPOYHpO4757o-2MiqgyxehyuPgCERj8l/#4) (last visited Nov. 4, 2017).

<sup>63</sup> Sullivan, *supra* note 1, at 413 n.122.

<sup>64</sup> *Id.* at 410 (noting that the FDA and USDA are supposed to approve "all animal-product labels" the agencies do not generally enforce labels in the animal welfare area, aside from the USDA inspecting "labels merely to determine conformity with producer-submitted affidavits regarding the claimed welfare practices").

<sup>65</sup> *Id.* at 410–12 (describing credibility problems).

<sup>66</sup> *Id.* at 412–13.

terms of the animals they apply to, the stages of production covered, the types of entities certified under the programs, and their cost to participants, among other differences.<sup>67</sup>

The American Humane Association claims to have “created the first welfare certification program in the United States”<sup>68</sup> and was also an early lobbyist for federal animal welfare laws.<sup>69</sup> Its primary voluntary certification program, American Humane Certified, involves producers following a set of Association standards for “birth through slaughter,”<sup>70</sup> written by its scientific advisory committee,<sup>71</sup> and receiving an initial third-party audit followed by annual audits once a producer has been certified.<sup>72</sup> The organization offers certification for beef and dairy cattle, broiler chickens, various types of laying hens (cage free versus free range, for example), pigs, and turkeys.<sup>73</sup> Fifty producers are currently certified.<sup>74</sup> This somewhat low number of participating farms—dominated primarily by egg and poultry producers—might result from what appears to be a relatively stringent set of standards with close tracking of compliance. For example, with respect to the welfare of beef cattle, each certified producer must report details such as the exact number of various types of cattle at the farm (cows, bulls, calves, and others), the “monthly number of pounds of beef sold,” information on animal housing, and the name of the entity who transports cattle from the farm “for any reason.”<sup>75</sup> The standards, which exceed 100 pages for many of the animals covered, range from requirements for maintaining and following certain plans, such as plans ensuring adequate nutrition and lighting for cattle as well as documenting herd health, to specific requirements such as feeding young calves colostrum and prohibitions on yelling or screaming at cattle, among hundreds of other specifics.<sup>76</sup>

Certified Humane offers a similar standard certification program with a goal to “improve the lives of animals by driving consumer demand for kinder and more responsible farm animal practices.”<sup>77</sup> Their standards, which are also livestock-specific and relatively

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<sup>67</sup> JAMIE RENNER & ELLEN GRISWOLD, AM. SOC’Y FOR THE PROT. OF CRUELTY TO ANIMALS AND CTR. FOR AGRIC. & FOOD SYS. AT VT. LAW SCH., FARM ANIMAL WELFARE CERTIFICATION GUIDE 7 (2017), <https://www.aspc.org/sites/default/files/frm-wlfr-cert-guide-feb2017.pdf>.

<sup>68</sup> *About Our Program*, AM. HUMANE ASS’N, <http://www.humaneheartland.org/about-us> (last visited Nov. 4, 2017).

<sup>69</sup> AM. HUMANE FARM PROGRAM, AM. HUMANE CERTIFIED, ANIMAL WELFARE STANDARDS AUDIT TOOL: BEEF CATTLE 1 (2017), [http://humaneheartland.org/index.php?option=com\\_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Audit+Tools](http://humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Audit+Tools).

<sup>70</sup> RENNER & GRISWOLD, *supra* note 67, at 7.

<sup>71</sup> AM. HUMANE FARM PROGRAM, *supra* note 70, at 1.

<sup>72</sup> *Becoming American Humane Certified*, *supra* note 69.

<sup>73</sup> *Science-Based Standards*, AM. HUMANE ASS’N, [http://www.humaneheartland.org/index.php?option=com\\_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements](http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements) (last visited Nov. 4, 2017).

<sup>74</sup> *All Producers*, AM. HUMANE ASS’N, <http://www.humaneheartland.org/humane-certified-producers/category/all-producers> (last visited Nov. 4, 2017).

<sup>75</sup> HUMANE FARM ANIMAL CARE, ANIMAL CARE STANDARDS: BEEF CATTLE 2 (2014), <http://certifiedhumane.org/wp-content/uploads/Std14.BeefCattle.2A-1.pdf>.

<sup>76</sup> *Id.* at 4–9.

<sup>77</sup> Our Mission, Certified Humane, and Global Animal Partnership are typically cited as the major certification programs, in addition to AWA described *infra*. See Sullivan, *supra* note 1, at 411 (listing these

lengthy, focus on “access to wholesome and nutritious feed,” “appropriate environmental design,” “caring and responsible planning and management,” “skilled, knowledgeable and conscientious animal care,” and “[c]onsiderate handling, transport, and slaughter.”<sup>78</sup> The standards are written by a scientific committee consisting of “animal scientists, veterinarians, and producers,”<sup>79</sup> and program participants receive initial certification after an inspection and thereafter receive annual inspections and certificate renewals upon passing the inspection.<sup>80</sup>

Global Animal Partnership is another large third-party provider of standards, auditing, and certification for animal welfare. Its welfare standards which include five “steps” ranging from basic animal welfare to the most rigorous standards involving an “animal-centered” farm.<sup>81</sup> Suppliers that include this label on their products must have passed an initial third-party audit to prove compliance with the standards and undergo an on-farm audit every fifteen months.<sup>82</sup>

Beyond these major certification programs<sup>83</sup> available to both small and large farms, Animal Welfare Approved (AWA) is a commonly-used animal welfare audit and certification program tailored specifically to smaller, independent family farms.<sup>84</sup> AWA writes standards “in collaboration with scientists, veterinarians, researchers, and farmers,” certifies farmer compliance with these standards, and audits each participating farm “at least once a year” to ensure ongoing compliance.<sup>85</sup>

In other cases, associations of livestock producers have guidelines that producers can voluntarily follow without being part of a formal certification program. For example, the National Turkey Federation publishes Animal Care Best Management Practices with standards for various control points—identifiable, discrete aspects of raising turkeys for which separate standards are specified, such as “building facilities and equipment design,” “personnel training,” and “feed and water supply” and “environmental control and bird comfort.”<sup>86</sup> Other associations publish more general guidelines designed for educational purposes, not certification. For example, the Beef Quality Association (BQA) has Cattle Care & Handling Guidelines with recommendations for proper handling, feeding, and transport of cattle, as well as disease prevention and similar practices that potentially improve meat quality but also affect animal welfare. The BQA emphasizes that the guidelines are “to be used as an educational

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four programs); RENNER & GRISWOLD, *supra* note 67, (comparing Certified Humane, Global Animal Partnership, and AWA).

<sup>78</sup> HUMANE FARM ANIMAL CARE, *supra* note 76, at i.

<sup>79</sup> *Id.* at ii.

<sup>80</sup> HUMANE FARM ANIMAL CARE, PROGRAM/POLICY MANUAL 13 (2016), <http://certifiedhumane.org/wp-content/uploads/Pol16.1A.pdf>.

<sup>81</sup> *5-Step Animal Welfare Rating*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/mission-values/animal-welfare/5-step-animal-welfare-rating> (last visited Nov. 4, 2017).

<sup>82</sup> *Consumers are Paying More Attention to Where Their Food is Being Sourced*, GLOBAL ANIMAL PARTNERSHIP, <https://globalanimalpartnership.org/partners/retailers-foodservice/> (last visited Oct. 28, 2017).

<sup>83</sup> HUMANE FARM ANIMAL CARE, *supra* note 81, at 4.

<sup>84</sup> *About*, ANIMAL WELFARE APPROVED, <https://animalwelfareapproved.us/about/> (last visited Oct. 28, 2017).

<sup>85</sup> *Id.*

<sup>86</sup> NAT’L TURKEY FED’N, ANIMAL CARE: BEST MANAGEMENT PRACTICES 15–23 (2012), <http://www.eatturkey.com/sites/default/files/welfarm2012.pdf>.

resource.”<sup>87</sup> These types of industry standards often meet skepticism because they typically do not “employ animal-welfare experts at any step of the process,” in addition to lacking auditing.<sup>88</sup> Professor Sullivan notes, however, that United Egg Producers employs independent auditing for its Animal Husbandry Guidelines.<sup>89</sup>

Some grocery stores, restaurants, and other businesses also conduct supply chain verification for animal welfare.<sup>90</sup> For example, Whole Foods Market requires suppliers to verify compliance with minimum standards, which include, for example, a prohibition on animals being raised in cages or crates or being tethered and a requirement that ruminants “spend at least two-thirds of their life on pasture.”<sup>91</sup> Suppliers must use a third-party auditor to demonstrate compliance with these standards.<sup>92</sup> All beef, pork, chicken, and non-kosher turkey sold at Whole Foods also must be certified by the nonprofit Global Animal Partnership.<sup>93</sup> McDonald’s indicates that in 2000 it “worked to make sure the hens our suppliers worked with were properly cared for by increasing the space around them and ensuring there wasn’t any forced molting. We also monitored that area to make sure all waste was disposed of properly.”<sup>94</sup> It additionally promises that by 2025 all of its eggs will be “sourced from hens raised in a cage-free aviary system, which is a hen housing system where the hens roam freely through an open barn or section within the barn.”<sup>95</sup> The chain has similarly committed to ensure that its suppliers have phased out gestation stalls for pregnant sows “by the end of 2022.”<sup>96</sup>

The range of informal to formal labeling, certification and auditing, supply chain verification, and other market-based approaches that rely on information conveyed to consumers and changes in consumer and producer behavior based on this information suffer from a variety of flaws. As shown in the nutrition labeling context, consumers often do not read labels, and even when they do read them, they have difficulty adequately understanding the information and putting it to good use.<sup>97</sup> Further, in the animal welfare context, the “profusion of competing animal-welfare labels,” many of which are not particularly rigorous and are not backed by certification and auditing programs, might

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<sup>87</sup> BEEF QUALITY ASSURANCE, CATTLE CARE & HANDLING GUIDELINES 4 (2015), [http://www.bqa.org/Media/BQA/Docs/cchg2015\\_final.pdf](http://www.bqa.org/Media/BQA/Docs/cchg2015_final.pdf).

<sup>88</sup> Sullivan, *supra* note 1, at 411.

<sup>89</sup> *Id.* at 411 n.109.

<sup>90</sup> See, e.g., Susan Adams, *Legal Rights of Farm Animals*, MD. B.J. 19, 20–21 (2007) (noting various grocery stores and food service suppliers’ commitments to phasing out cage free eggs).

<sup>91</sup> *Farm Animal and Meat Standards*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/farm-animal-meat-quality-standards> (last visited Oct. 28, 2017).

<sup>92</sup> *Id.* See also Nicole E. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1390–91 (2015) (describing the Whole Foods animal welfare approach).

<sup>93</sup> *Animal Welfare Basics*, WHOLE FOODS MKT., <http://www.wholefoodsmarket.com/mission-values/animal-welfare/animal-welfare-basics> (last visited Oct. 28, 2017).

<sup>94</sup> *Sourcing and Sustainability*, MCDONALD’S, <https://stage-gws.mcdonalds.com/us/en-us/about-our-food/our-food-your-questions.html#sourcing-sustainability> (last visited Oct. 28, 2017). See also Negowetti, *supra* note 92, at 1392 n.394 (describing the McDonald’s cage-free promise).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 675–78 (2011); Winters, *supra* note 44, at 818–19.

contribute to consumer doubt regarding the quality of these claims, as well as general confusion as to their meaning.<sup>98</sup> Some scholars and advocates have accordingly called for one harmonized, verified standard—either government or nonprofit based.<sup>99</sup>

Outside of supermarkets and chain restaurants, many consumers appear to rely on a different mechanism for purchasing food produced more humanely. As discussed in the following Part, many consumers appear to seek out local food as a proxy for animal welfare, in addition to other reasons for preferring local food.

#### IV. MARKET-BASED STRATEGIES FOR LOCALISM AND ANIMAL WELFARE

Relying on consumers to nudge producer behavior toward better treatment of animals will be a particularly difficult project because as others have observed, the welfare of the animals behind a food product is a “credence quality”—one that cannot be ascertained by looking at or consuming the product.<sup>100</sup> Choosing supposedly “local” products is a rough, but somewhat easier means of ensuring minimal welfare standards. But the “local” attribute, too, is largely a credence quality, with the exception of food purchased on-farm, where the conditions behind the food can be directly observed, aside from certain stages like the slaughtering process.<sup>101</sup> And the local label is commonly abused. This Part discusses localism as a proxy for animal welfare and the problem of local food fraud, then briefly explores potential strategies for addressing the problem, with a focus on the restaurant context.

##### A. *Localism as a Proxy for Animal Welfare*

The recent explosive growth of the local food movement results from a variety of factors, including many with little connection to animal welfare. Shoppers at farmers’ markets and farm-to-table diners seek out higher-quality, better-tasting food and also cite to the environmental attributes (whether real or perceived) and community benefits of locally-sourced products.<sup>102</sup> But many consumers also purchase food raised on small, independent farms for reasons relating to animal welfare.<sup>103</sup> Indeed, even when their

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<sup>98</sup> Sullivan, *supra* note 1, at 417.

<sup>99</sup> *Id.* at 418–21 (arguing for this approach while noting that it has limitations, including, for example, the problem that the attributes demanded by consumers might not in fact be the most important animal welfare practices from a philosophical or scientific perspective).

<sup>100</sup> Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973); Sullivan, *supra* note 1, at 409 (describing “the level of animal welfare associated with food production” as a classic credence good).

<sup>101</sup> In some cases, customers can even view slaughtering when it occurs outdoors on farms, as it sometimes does for poultry.

<sup>102</sup> See, e.g., STEVE MARTINEZ ET AL., U.S. DEP’T OF AGRIC., LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES 29–30 (2010), [https://www.ers.usda.gov/webdocs/publications/46393/7054\\_err97\\_1\\_.pdf?v=42265](https://www.ers.usda.gov/webdocs/publications/46393/7054_err97_1_.pdf?v=42265) (summarizing consumer preference survey data).

<sup>103</sup> See, e.g., *id.* at 4 (“Some consumers also extend sustainable production [which they associate with local food] to include fair farm labor practices and animal welfare.”); Pamela Vesilind, *Animal Husbandry Redux: Redefining “Accepted Agricultural Practices” for Locally-Sourced Foods*, 28 NAT. RESOURCES & ENV’T 37, 38 (2013) (observing that “[l]ocal food enthusiasts know enough about industrial animal

preferences are not primarily welfare based, consumers “place a high precedence on any information that can relate to the origin and production of their food”<sup>104</sup>—including meat—according to surveys. And livestock raised on smaller farms with fewer animals are less likely to be crammed into small living quarters and, in some cases, more likely to have access to the outdoors than animals on large factory farms.<sup>105</sup> If animals on local farms and ranches are indeed better treated, though, what matters is that some consumers are willing to seek out, and pay a premium for, local meat, leading ultimately to an expanded supply—regardless of their motivations.

### *B. The Problem of Local Food Fraud*

As with animal welfare labeling, there is currently no “standard definition” of local foods, including local meat,<sup>106</sup> yet “local” labeling—some deceptive and some not—abounds. Unfortunately, fraudulent use of the label both at the producer and restaurant level appears to be somewhat common. Investigations of farmers markets show that some sellers claim to sell local food, but in fact purchase the food from grocery stores and resell it for a premium.<sup>107</sup> This is revealed primarily through visits to farms—for example, when vendors claiming to sell local watermelon do not have any watermelon crops on their property—or, in some cases, from sales of supposedly local produce that is not in season in the area.<sup>108</sup>

Some farmers markets have attempted to curb fraud and to verify the source of produce by requiring farmers to submit crop acreages, crop lists, and other information that allows market managers to assess whether the purportedly local food could have realistically been grown by the producer.<sup>109</sup> And some of these markets have staff that periodically inspect farms to verify that the claimed acreages and crop types exists.<sup>110</sup> But not all markets have the resources to carry out these types of verification and enforcement; many simply rely on grower affidavits stating that the growers have in fact produced the food at the market and that information in their crop and acreage lists is correct.<sup>111</sup>

It appears the false claims of localism at restaurants may be similarly common. In addition to patronizing farmers markets, consumers can also find local food at restaurants.<sup>112</sup> Sometimes, however, menu items described as local are, in fact, not. In some

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production to reject, or at least disapprove of, eggs, meat, and dairy products from confined animal feeding operations (CAFOs”).

<sup>104</sup> KIMBERLY A. VARNOLD ET AL., IMPORTANCE OF STEAK ORIGIN TO RESTAURANT CUSTOMERS (n.d.), <http://beef.unl.edu/b11eefdf-8342-4eda-8290-7e873ffc5d7c.pdf>.

<sup>105</sup> Cf. Kim Castleberry, *5 Tips for Buying Beef*, NAT. RESOURCES DEF. COUNCIL (Aug. 21, 2015), <https://www.nrdc.org/stories/5-tips-buying-better-beef> (“In the United States, most grass-fed and ‘better’ beef is produced on small farms and sold directly to consumers.”).

<sup>106</sup> Michelle Nowlin, Emily Spiegel & Graham McHenry, *(M)eat Local®: Market and Distribution Challenges in the Local Meat System*, 25 DUKE ENVTL. L. & POL’Y F. 339, 347 (2015).

<sup>107</sup> Wiseman, *supra* note 9, at 369.

<sup>108</sup> *Id.* at 369, 375–77.

<sup>109</sup> *Id.* at 379–81.

<sup>110</sup> *Id.* at 379–84.

<sup>111</sup> *Id.* at 381–82, 385–89.

<sup>112</sup> *What Do the Numbers Say?*, COMMUNITY INVOLVED SUSTAINING AGRIC., <https://www.buylocalfood.org/about/goal-double-local-food/25-percent> (last visited Nov. 4, 2017).



cases the deception may be accidental; a chef might write “local” on the blackboard if one shipment of local lettuce has arrived and might forget to erase this claim when forty other boxes of run-of-the-mill lettuce arrive on the food service truck.<sup>113</sup> In other cases restaurants simply claim to be “farm-to-table” or to have locally-sourced ingredients to charge more and attract customers demanding these sorts of foods, yet they make little or no effort to regularly purchase local ingredients. A two-month investigation by a *Tampa Bay Times* reporter, who looked at fifty-four restaurants that claimed to use local ingredients, revealed rampant fraud.<sup>114</sup> The reporter checked invoices, called producers and vendors, and visited farms in order to trace back the source of these restaurants’ ingredients; she also ordered DNA sampling for allegedly local fish. The reporter concluded that “more often than not,” restaurant claims regarding local food are “fairy tales.”<sup>115</sup> The same could be true of restaurant claims to use non-local but “humanely-raised” meat.

Some states attempt to curb this fraud as part of their inspections for food safety. But the resources available for conducting these inspections are scant. The *Tampa Bay Times* investigation noted that “[f]or 40,000-some Florida restaurants, 191 inspectors from the state’s Department of Business and Professional Regulation oversee them all for safety, sanitation and—occasionally—lies.”<sup>116</sup> The department indicates that “[m]isrepresentation of food items at restaurants has been of particular interest in recent years,”<sup>117</sup> and, from 2006 through November 2017, it investigated 1,773 cases with violations.<sup>118</sup> The vast majority of the violations appear to be seafood-based, with descriptions such as “menu advertises grouper [a Florida fish]. No grouper on site, product on hand is pangasius [a Vietnamese fish].”<sup>119</sup> Various uses of imitation crab in lieu of advertised crab are also quite

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(indicating that all local food purchased in a portion of Massachusetts and Vermont amounted to \$8.9 million in sales, with \$2 million of those purchases coming from restaurants buying the local food).

<sup>113</sup> “Farm to Fable”? *Tampa Probe Finds Many Restaurants Lie About Sourcing*, NAT’L. PUB. RADIO (Apr. 14, 2016), <http://www.npr.org/sections/thesalt/2016/04/14/474258801/farm-to-fable-tampa-probe-finds-many-restaurants-lie-about-sourcing> (noting that “[t]here were plenty of people [chefs] who were honestly surprised to find something was still on the chalkboard or still on their menu many months after they’d purchased that product”).

<sup>114</sup> Laura Reiley, *At Tampa Bay Farm-To-Table Restaurants, You’re Being Fed Fiction*, TAMPA BAY TIMES (Apr. 13, 2016), <http://www.tampabay.com/projects/2016/food/farm-to-fable/restaurants/>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; see generally *Division of Hotels and Restaurants: Public Food Service and Lodging Inspections*, FLA. DEP’T BUS. & PROF. REG., <http://www.myfloridalicense.com/dbpr/hr/inspections.html> (last visited Nov. 8, 2017) (describing the inspection of restaurants, or “public food service” establishments); *Terms of Use: Food & Lodging Inspections*, FLA. DEP’T BUS. & PROF. REG., <https://www.myfloridalicense.com/insptermsofUse.asp?SID=> (last visited Nov. 8, 2017) (stating that “most” restaurants are inspected by the Division of Hotel and Restaurants but that a few other agencies also have regulations and inspection responsibilities).

<sup>117</sup> *Division of Hotels and Restaurants: Food Misrepresentation Cases*, FLA. DEP’T BUS. & PROF. REG., <http://www.myfloridalicense.com/dbpr/hr/food-lodging/foodmisrep.html> (last visited Nov. 8, 2017).

<sup>118</sup> *Id.* (follow “2006 through last month” hyperlink).

<sup>119</sup> *Id.*; see also Allison Guy, *You’re Probably Eating Asian Catfish Without Knowing It: Should You Be Worried?*, OCEANA (Sept. 13, 2016), <http://oceana.org/blog/you%E2%80%99re-probably-eating-asian-catfish-without-knowing-it-should-you-be-worried> (stating “[i]t might be called grouper or sole on the menu, but if you test your dinner’s DNA, there’s a decent chance you’ll find that you’re actually eating farm-raised Vietnamese catfish,” also known as pangasius).

common.<sup>120</sup> Few non-seafood violations are noted,<sup>121</sup> likely because it takes a reasonable amount of effort and resources to track invoices associated with meat and eggs in freezers and confirm the origin of those products. Locating imitation crab, in contrast, is a somewhat easier endeavor.

### C. Potential Solutions

For purchases direct from producers or with only one or two links between the producer and supplier, such as in a grocery store, improved labeling of local products could better assure consumers that the products they are purchasing are in fact local. This, of course, raises other questions such as the need to develop a unified definition of local. But setting aside for now these important considerations for perfecting labels, relatively simple approaches such as including on the meat package the name and address of the entity that raised the meat could allow the consumer to relatively quickly verify the source of the meat. Because most meat products must go through a USDA-certified slaughterhouse (with the exception of poultry on small farms),<sup>122</sup> states could require the slaughterhouse to add a label to the packaging indicating the farm from which the animal was delivered to the slaughterhouse.

This labeling approach—while capitalizing on a common processing point for most local meats—would not be as simple as it sounds. Many small family farms already object to the limited packaging options at slaughterhouses, such as the inability to obtain value-added packaging like vacuum sealing.<sup>123</sup> But if slaughterhouses that accept meat from small independent farms could identify a relatively inexpensive type of label that would adhere to the common types of packaging used, such as freezer paper, for a small added fee this label could be placed on all meats leaving the slaughterhouse.

Verifying the local nature—as well as humanely-raised claims—of restaurant meats, which account for a significant percentage of meat consumed, will be more difficult and costly. It is unlikely that cash-strapped states would be willing to pay for more inspectors to look beyond the imitation crab meat and verify that various meat and egg products in freezers in fact came from local farms. But if slaughterhouses had to include a farm name and address on all meat packaging, the limited number of inspectors already employed by states could look relatively quickly through refrigerators and freezers to verify the origin of most of the animal products. And penalties, which are currently low,<sup>124</sup> could be

<sup>120</sup> See *Division of Hotels and Restaurants: Food Misrepresentation Cases*, *supra* note 117.

<sup>121</sup> *Id.* The non-seafood violations appear to involve personnel, not other types of food. For example, in some cases the claimed “food manager” lacked food manager certification.

<sup>122</sup> 9 C.F.R. § 381.10 (2017).

<sup>123</sup> Nowlin, Spiegel & McHenry, *supra* note 106, at 362.

<sup>124</sup> Federal laws prohibiting labeling fraud that is not associated with drugs provide for imprisonment of not more than one year or a fine of not more than \$1,000. 21 U.S.C. § 331 (describing the prohibited acts of misbranding foods or drugs); *id.* § 333 (describing the penalties). In Florida, a first violation often simply results in an inspector requiring problems to be corrected by the next inspection or issuing a warning of “violations that must be corrected by a certain date or within a specified number of days.” *Division of Hotels and Restaurants: Enforcement Actions*, FLA. DEP’T BUS. & PROF. REG., <http://www.myfloridalicense.com/dbpr/hr/inspections/Enforcement-Actions.html> (last visited Nov. 8, 2017). When fraudulent use of fish is noted, in some cases from the current fiscal year, the problem was noted as having been corrected in a follow-up inspection. In other cases, an administrative complaint is issued. *Division of Hotels and Restaurants: Food Misrepresentation Cases*, *supra* note 117 (follow “Current Fiscal Year (July 1 through last month)” hyperlink; then locate Row 3 and Row 20).

increased, perhaps dramatically, to offset the low probability of getting caught. For restaurants making humanely-raised claims, some combination of increased inspections and increased penalties may be the best solution—if and where the political will to implement them exists.

For local food claims, local food groups and nonprofit agricultural organizations could supply the resources needed for verifying the local origin of animal products at restaurants, conducting the types of investigations completed by the *Tampa Bay Times*. These groups could have volunteers ask restaurants for the origins of their animal products and then call the farmers to verify that they in fact supply the restaurants. These groups could then engage in informal internet-based shaming strategies for restaurants that appeared to be repeat offenders with respect to local food claims. Local farmers affected by the dilution of the value of their product through fake substitution could also threaten legal action in the form of misappropriation.

Verifying that meats and eggs on restaurant menus are in fact local or humanely-raised will not be easy, particularly in the absence of increased governmental enforcement. Without improved verification, however, consumer spending on animal welfare will be misdirected, and more animals, along with producers of genuinely local and humanely-raised meats, will suffer.

## V. CONCLUSION

With concern surrounding the humane treatment of livestock seemingly becoming stronger, the most direct path to improved farm animal welfare would be a regulatory one. Federal, state, or local officials—or all of them—would issue statutes, regulations, or ordinances mandating a baseline of humane animal treatment and providing for monitoring and enforcement of these requirements. But aside from very limited federal regulation and a small set of state and local regulations, this has not been the path taken so far. A second-best solution would involve reliance on market-based mechanisms that provide consumers with accurate, understandable, easily processed and verified information about the conditions to which farm animals were subjected while being raised and slaughtered. But these, too, are limited, and verification of animal welfare practices can be time consuming and expensive, as well as difficult for consumers to process and fully understand.

Relying on local production as a proxy for animal welfare is perhaps a third-best mechanism, but it is a useful one. Small, independent farms are more likely to provide a level of animal welfare superior to factory farms, and some customers can directly verify certain animal practices by visiting the farm and purchasing their food there. But for the customers who rely on the “local” or “humanely-raised” label when buying meat at a restaurant, better practices are needed to verify that the meat has the attributes ascribed to it. In their absence, producers of local and humanely-raised meats, consumers, and animals will suffer.